

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

Transitz  
PK-I

30352

FILE: B-215745 DATE: February 4, 1985  
MATTER OF: Tonka Equipment Company

## DIGEST:

1. GAO will consider a complaint against Town of Linden, Indiana, procurement where federal grant funds involved in the procurement are substantial both as to percentage of contract price and dollar amount.
2. A grantee's determination that proposed equipment supplier is nonresponsible is unobjectionable where there is no allegation of bad faith and record shows that grantee's investigation into equipment supplier's manufacturing background resulted in a finding of uncertainty concerning whether equipment supplier could furnish equipment capable of meeting the grantee's needs as specified in the solicitation.
3. An assertion of bias on the part of a grantee will not be considered where not supported by substantive evidence.

Tonka Equipment Company (Tonka) has filed a complaint against a contract award made by the Town of Linden, Indiana (Town), for water treatment filtration improvements. The contract is funded in large part (\$148,350 or over 75 percent of the total cost of \$194,600) by a grant from the Department of Housing and Urban Development (HUD).

HUD initially alleges that this Office lacks jurisdiction to consider Tonka's complaint.

Our Office has the authority to "investigate . . . all matters relating to the receipt, disbursement, and use of public money." 31 U.S.C. § 712 (1982). However, due to the size of government operations and our limited resources, we must necessarily exercise discretion in determining the

03/139

matters in which we become involved. See Engineering Services Systems, Inc., B-208553, Sept. 27, 1982, 82-2 C.P.D. ¶ 284. In our public notice, entitled "Review of Complaints Concerning Contract Awards under Federal Grants," 40 Fed. Reg. 42406, September 12, 1975, we indicated that our Office would undertake reviews concerning the propriety of contract awards made by grantees in furtherance of grant purposes upon the request of prospective contractors. See Mid-State Ag Service, Inc., B-213200, Mar. 12, 1984, 84-1 C.P.D. ¶ 283; Engineering Services Systems, Inc., B-208553, *supra*; Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 C.P.D. ¶ 237. While our notice also states that we will not review complaints in which the federal funds in the project as a whole are insignificant, where, as here, the federal grant funds involved in the procurement are substantial both as to percentage of the contract price and dollar amount, we will consider the complaint. See Tonka Equipment Company, B-215724, Dec. 11, 1984, 84-2 C.P.D. ¶ 647. The Harris Corporation, B-194151, Apr. 22, 1980, 80-1 C.P.D. ¶ 282.

The complaint is denied in part and dismissed in part.

The solicitation issued by the Town provided that award would be made on the basis of the lowest bid submitted by a responsible bidder. Evans Construction (Evans), the low bidder, submitted a bid offering either of two manufacturer's water filtration equipment: the Tonka Ducalator VI or the General Filter Company (GFC) Aeralator. Evans' bid price based upon the Tonka equipment was \$100,335, while its price based upon the GFC equipment was \$106,335.

The Town reports that, based upon the advice of the Town's consulting engineer, Tonka was found nonresponsible and that award was made to Evans based upon the GFC equipment. Following bid opening, the consulting engineer requested that Tonka provide information concerning the company's production of the Ducalator VI unit offered, including the number of units built, their sizes, and length of time in operation. In this regard, the solicitation notified bidders that the Town "may make investigations to determine the ability of the bidders to perform the work and the bidder shall furnish . . . all information and data for this purpose. . . ."

The Town reports that Tonka responded to the consulting engineer's request with a list that noted three Ducalator VI design units, their sizes, and locations. After reviewing

the information and visiting a Tonka Ducalator VI installation site, the consulting engineer reported that it was not possible to determine whether Tonka could supply equipment capable of meeting the Town's needs as specified in the solicitation because the information supplied by Tonka indicated that the firm had not built the Ducalator VI unit as small as the unit required under the solicitation and because, Tonka, in fact, only had been manufacturing the (larger) Ducalator VI units for less than a year.

Tonka responds that award to Evans based upon the GFC equipment was improper because the Tonka equipment was lower priced and because Tonka's equipment meets or exceeds the solicitation specifications. Tonka also states that it has manufactured Ducalator units smaller than the unit required under the solicitation. In any event, Tonka maintains that the consulting engineer improperly considered the company's past manufacturing experience in determining Tonka nonresponsible because the solicitation failed to indicate that such experience would be considered.

Our Office has reviewed the propriety of contract awards made by grantees to comply with grant terms, agency regulations, and applicable statutory requirements. Tonka Equipment Company, B-215724, supra. While we have not reviewed all subcontractor complaints under a prime contract funded by a federal grant, we will review this complaint, since the grantee participated directly in the subcontractor selection process. See Tonka Equipment Company, B-215724, supra.

The terms of the grant here required the Town to conduct this procurement in accordance with Office of Management and Budget (OMB) Circular No. A-102. Attachment "O" to that circular establishes procurement standards and guidelines for federal grantees. Under these guidelines, grantees must use procurement procedures that promote maximum open and free competition. Since none of the parties has cited any state procurement law that would apply in deciding the merits of Tonka's complaint, our review is founded on whether rejection of Tonka's equipment was consistent with the fundamental principles of federal procurements inherent in the concept of competition and reflected in the OMB guidelines. Tonka Equipment Company, B-215724, supra.

In direct federal procurements, while a decision as to the prospective ability of a firm to supply the prime contractor with equipment capable of the level of performance specified in the solicitation (responsibility) should be

based on fact and reached in good faith, it is properly left to the contracting agency, which must bear the brunt of any difficulties encountered during performance and must maintain day-to-day relations with the contractor. Athens General Contractors, Inc., B-212661, Apr. 17, 1984, 84-1 C.P.D. ¶ 427; Patterson Pump Company; Allis Chalmers Corporation, B-200165, B-200165.2, Dec. 31, 1980, 80-2 C.P.D. ¶ 453. Thus, we will not disturb a determination of nonresponsibility unless it lacks a reasonable basis. Athens General Contractors, B-212661, supra.

Here, while Tonka points out that it has manufactured Ducalator units for several years, the firm concedes that it only has been manufacturing the Ducalator VI design offered for "approximately one year." In fact, two of the three Ducalator VI units for which Tonka provided information pursuant to the consulting engineer's request are listed as "under construction." Further, the information provided on the Ducalator VI indicates that Tonka has not manufactured this particular unit with the capacity required by the Town. To date, Tonka has not shown otherwise. Therefore, in our view, the Town reasonably determined that it could not award to Evans based on the Tonka equipment because there existed uncertainty concerning whether Tonka could supply equipment capable of the performance standards specified in the IFB.

Further, concerning Tonka's allegation that the Town improperly considered Tonka's past manufacturing experience because the solicitation failed to indicate that such experience would be considered, we point out that the solicitation, as noted above, provided that the Town would investigate bidders' ability to perform the requirement. Since the ability of the subcontractor to supply the prime contractor bidder with equipment capable of meeting the contract requirement concerns bidder responsibility, we find that the Town properly inquired into Tonka's manufacturing experience. Patterson Pump Company; Allis Chalmers Corporation, B-200165, B-200165.2, supra; Gramercy Contractors, Inc., B-189327, Nov. 8, 1977, 77-2 C.P.D. ¶ 348.

Finally, Tonka asserts that the sole reason the contract was not awarded to Evans based upon the Tonka equipment was the Town's personal preference for or bias in favor of GFC equipment. This assertion is unsupported by any substantive evidence and we have found that the record

supports the nonresponsibility determination. We, therefore, dismiss this argument. See Lion Brothers Company, Inc., B-212960, Dec. 20, 1983, 84-1 C.P.D. ¶ 7.

*for* *Milton J. Doreau*  
Comptroller General  
of the United States